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No. 80-1924

In the Supreme Court of the United States

OCTOBER TERM, 1980

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

ANTHONY M. ROSSI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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Department of Justice
Washington, D.C. 20530
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Respondents correctly characterize (Br. in Opp. 2) the issue presented by this case as "solely a matter of statutory construction." That issue is whether the "treaty" exception in Section 106 of Pub. L. No. 92-129, 85 Stat. 355, codified at 5 U.S.C. (Supp. III) 7201 note, includes binding international agreements, such as the Base Labor Agreement of 1968 between the United States and the Republic of the Philippines (BLA), or is limited to Article II treaties, which must be approved and consented to by two-thirds of the Senate.

1. Respondents acknowledge (Br. in Opp. 3, 5) that, at the time Section 106 was adopted, *no* Article II treaty addressed the issue of hiring preferences, whereas there were in existence *at least 14* binding international agreements providing for preferential hiring of local nationals. Nonetheless, respondents argue that by enacting Section 106 Congress intended to abrogate every one of those agreements without ever adverting to them, much less to the ramifications such action would have in the international arena. But "[i]f Congress intended a result so drastic, it is not unreasonable to expect that it would have said so expressly." *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 285 n.13 (1974). Contrary to respondents' contentions, therefore, we submit that "[t]he silence of the sponsors of [Section 106] is pregnant with significance * * * ." *NLRB* v. *Fruit & Vegetable Packers*, 377 U.S. 58, 66 (1964).

Moreover, the record shows more than Congress' mere failure to mention the effect that Section 106 could have on the 14 existing international agreements. It also reflects that Congress perceived the need for an exception from the statute for "treaties," despite the fact that the Article II treaty format had never been employed to provide hiring preferences (Pet. 14). This strongly suggests a legislative understanding that *all* agreements concluded by the President and having the force of law between nations would be exempt from Section 106 by virtue of its "treaty" exception.

2. Section 106 was introduced as an amendment to a military pay bill. In the course of debate over that bill, Congress frequently expressed its concern with the poverty of American service members in Europe and the fact that many of their dependents

could not obtain employment in the local economies of host countries because of their tourist visa status. See 117 Cong. Rec. 16126 (1971).[1] This situation was drastically exacerbated by General Phipps' unilateral decision not to hire United States dependents in European Exchange System elements despite the Department of Defense Dependent Hire Program (see Pet. 15). That Senator Schweiker's introduction of Section 106 was directed against the Phipps memorandum rather than binding international agreements like the BLA is apparent from Senator Schweiker's response to a suggestion made in an article that appeared in *Stars & Stripes* (a semi-official newspaper produced for United States military personnel overseas). The article, parts of which were read into the record by Senator Schweiker, stated (117 Cong. Rec. 16128 (1971)) that

> [p]ortions of SOFA [the Status of Forces Agreement] could and should be changed to allow dependent wives to take many of the jobs now available solely to local nationals * * *.

Senator Schweiker responded (*ibid.*; emphasis added):

> Mr. President, let me interject there that we have done some research and find that, in Germany particularly, that is not the case. *Our commanding general who is head of the European Exchange System, Gen. Charles H. Phipps, in a memo of February 1971, issued this edict across Europe to all the stores and services in the exchange system:*

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[1] As we noted in the petition (at 16 & n.10), Congress' concern with service members' cost of living in Europe was irrelevant to the situation in the Philippines, where the cost of living is far below that in Europe.

> *For the reasons outlined above, I desire that the European Exchange System elements in the months ahead emphasize recruitment of local nationals and sharply deemphasize the utilization of United States dependents or tourists.*

Hence, it is clear that Senator Schweiker did not view as the problem the agreement in Germany (the NATO SOFA), but rather the type of situation that could be created by a single officer's order made in contravention of existing military policy of hiring dependents whenever possible. See 117 Cong. Rec. 16133 (1971) (remarks of Sen. Schweiker)).[2]

Respondents rely (Br. in Opp. 4-5), however, on the isolated statement by Senator Hughes (117 Cong. Rec. 16126 (1971)) that "[t]hose in the lowest ranks * * * are denied the opportunity to work on overseas bases, by agreement with the countries in which they are located * * *." It is difficult to ascribe any weight to this ambiguous remark. Although respondents correctly point out (Br. in Opp. 6) that work permit visas are not required of United States dependents who are employed on United States

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[2] Respondents rely (Br. in Opp. 5) on the following excerpt from a study made by two Army psychiatrists concerning the poverty of United States service members stationed in Europe, which Senator Schweiker also read into the record (117 Cong. Rec. 16132 (1971)): "Most civilian jobs on U.S. installations in Europe are held by local nationals or by persons from another European country. These jobs are classified as local national jobs and American dependents cannot fill the jobs because of this classification." Contrary to respondents' implication (Br. in Opp. 5), however, Senator Schweiker's apparent endorsement of this statement is entirely consistent with his focus on the ability of a single officer (like General Phipps) to order preferential hiring of local nationals, even in contravention of existing military policy.

bases overseas, such visas are required of United States citizens who work in the local economies of host countries. It is unclear whether Senator Hughes was aware of this distinction, because he made the comment quoted by respondents in the context of a discussion (117 Cong. Rec. 16126 (1971)) concerning the inability of many dependents to obtain jobs in the local economies because of their tourist visa status. In any event, this single statement—otherwise unexplained, inconsistent with other debate on Section 106, and arising out of a confused and contradictory legislative record—is, we submit, far too fragile a basis for imputing to Congress an intent to abrogate at least 14 binding international agreements.[3]

3. Respondents also rely (Br. in Opp. 7 & nn.24-25) on representations by the Department of Defense that the BLA, when renegotiated, would be submitted to the Senate for its advice and consent. These statements, however, also contain explicit reaffirmations of the Department of Defense's consistent view that

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[3] Respondents also mention (Br. in Opp. 2) a statement in the Senate Report that the Hughes-Schweiker Amendment was intended to provide that "the *Department of Defense* cannot discriminate against American citizens or their dependents in employment on military bases" (S. Rep. No. 92-93, 92d Cong., 1st Sess. 23 (1971); emphasis added), but they fail to appreciate the significance of this statement. It plainly shows that the Amendment was designed to prohibit discrimination such as that ordered by General Phipps, *i.e.*, discrimination by the Department of Defense. The statement in the Senate Report cannot be read to mean that the Amendment was intended to eliminate all discrimination, however imposed, at Department of Defense installations, because even respondents admit that discrimination could continue to occur, despite Section 106, if authorized by "treaty."

the BLA, as a binding international agreement, is a "treaty" within the meaning of Section 106. See Br. in Opp. App. 1a-2a; Plaintiffs' Opposition to Defendants' Cross-Motion for Summary Judgment (filed Feb. 26, 1979), Attachments Three through Five (App., *infra*, 1a-6a). See also A. 214-215.[4]

More important, any representations that future base agreements would be submitted to the Senate for its advice and consent are irrelevant to the question whether the "treaty" exception to Section 106 includes previously-negotiated executive agreements, because such representations in no way suggest that preferential hiring provisions are *required* to be submitted pursuant to Article II in order to come within the "treaty" exception in Section 106. Indeed, the new agreement between the United States and the Republic of the Philippines referred to by the Department of Defense finally was concluded in January 1979 in the form of an international agreement that did not require Senate advice and consent. 30 U.S.T. 863, T.I.A.S. No. 9224 (Jan. 7, 1979).

For the reasons stated above and in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

LAWRENCE G. WALLACE
Acting Solicitor General

JULY 1981

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[4] "A." refers to the joint appendix filed in the court of appeals.

APPENDIX

[SEAL]

DEPARTMENT OF THE NAVY
U.S. NAVAL BASE
BASE INDUSTRIAL RELATIONS OFFICE
Box 31
FPO San Francisco 96651

In Reply Refer to:
NS80A:SKG:bs
5863
28 Jun 1977

The Honorable Jesse Helms
Post Office Drawer 28125
Raleigh, North Carolina 27611

Dear Senator Helms:

Acknowledgement is made of your letter of 26 May 1977 received by this office 27 June 1977 regarding Mrs. Shirley A. Ward. A similar letter was received from the Honorable Senator Robert B. Morgan who had received a duplicate of the letter forwarded to you by Mrs. Ward.

Mrs. Ward has been employed since 31 May 1977 by the U.S. Naval Ship Repair Facility as a Security Clerk (Typing), GS-301-4. This appointment is temporary and will expire on 28 August 1977.

Mrs. Ward's application indicates that she was employed at the Naval Regional Medical Center, Camp Lejeune, N.C. as a Medical Records Technician, GS-5, from June 1975 until December 1976. From November 1972 to June 1975 she was employed at the Medical Center as a GS-3 & 4 Coding Clerk (Typing). Her record at Camp Lejeune was commendable.

The Base Labor Agreement with the Republic of the Philippines does mandate preferential employment of Filipino nationals and effectively precludes the hiring of Mrs. Ward as a Medical Records Technician. This matter is under study as a part of the treaty concerning the Military Bases Agreement currently under negotiation between the United States and Philippine governments. The Naval Regional Medical Center, Subic Bay neither employs nor is authorized any positions for U.S. Civil Service employees who are U.S. citizens.

I am sympathetic with Mrs. Ward's predicament and regret that I cannot be of assistance.

Sincerely yours,

S. W. SANDBURG
Director

ATTACHMENT THREE
CA 78-2346

ENCLOSURE (2)

Ser 008/20
11 Jan. 1977

Dear Senator Proxmire:

This is in further response to your enclosed letter of November 16, 1976, concerning hiring practices at Naval Station, Subic Bay, Republic of the Philippines.

Philippine nationals at Subic Bay currently do enjoy certain employment preferences in relation to dependents of U.S. servicemen and other U.S. citizens. This is in conformance to the Base Labor Agreement dated May 27, 1968 (19 U.S. Treaties, 5892).

Your constituent's letter questions whether such practice is in accordance with law. Public Law 92-129, Title I, Section 106, Stat. 355, provides in pertinent part that "unless prohibited by treaty" a civilian shall not be discriminated against in his or her employment at any Department of Defense installation in a foreign country because of United States citizenship or because the civilian is a dependent of a member of the United States Armed Forces.

The position of the Department of Defense, as stated in a letter of June 24, 1975, from the General Counsel, Office of the Secretary of Defense, to the General Accounting Office, is that the Base Labor Agreement is considered to be a treaty within the contemplation of the cited statute. The General Accounting Office, in a letter dated July 28, 1976, has notified the Secretary of Defense of its opinion to the contrary. Nevertheless, a Secretary of Defense message has subsequently advised the Navy that, pending review of Defense's Office of General Counsel, Defense still considers the Base Labor Agreement to have the ef-

fect of a treaty. Accordingly, the required preferences are presently being extended.

The subject of employment preferences at Subic Bay is among those being addressed by the United States and Philippine governments during the current negotiation of a Military Bases Agreement.

Thank you for your interest in this matter.

Sincerely,

J.A. MAZZOLINI
Captain, U.S.N.
Deputy Naval Inspector General

The Honorable William Proxmire
United States Senate
Washington, D.C. 20510

Attachment Four
CA 78-2346

[SEAL]

DEPARTMENT OF THE NAVY
OFFICE OF CIVILIAN PERSONNEL
Washington, D.C. 20300

In Reply Refer to:
OCP 2611:tee
1 Apr 1977

Honorable Henry M. Jackson
United States Senate
Washington, D.C. 20510

Dear Senator Jackson:

This is in further response to your letter of 4 January 1977 on behalf of Ms. Maureen E. Conard. Ms. Conard wrote you concerning discrimination against employment of dependents in favor of foreign nationals at the Naval Station, Subic Bay, Philippines.

The basic proposition of Mrs. Conard's letter is that the current Base Labor Agreement with the Philippines, which provides for the preferential employment of Filipinos, is contrary to Public Law 92-129; that Public Law provides that, *unless prohibited by treaty,* no person shall be discriminated against by the Department of Defense in the area of employment of civilian personnel at Defense facilities in any foreign country due to his or her status as a U.S. citizen or a dependent of U.S. military personnel. Among matters raised by the General Accounting Office to the Secretary of Defense in April of 1975 was that of Public Law 92-129. In its response, the Office of the Secretary of Defense cited its opinion based upon court decisions and in-

ternational law that the Base Labor Agreement did constitute a treaty for the purpose of Section 106 of the Public Law. The current Department of Defense policy guideline in this area directs that the Base Labor Agreement with the Philippines should be considered as having the nature of a treaty. In view of Defense policy, preferential employment of Filipinos is not considered to be contrary to law.

Senate Report 92-S3 [*sic*], which reveals part of the intent of Congress in enacting the Public Law, states that the law is aimed at correcting a situation which exists primarily on some American bases in Europe. On those American bases, according to the Senate Report, preferential employment of local nationals has helped to create conditions of poverty for families of American enlisted men. This is not the situation in the Philippines, where the local price structure creates a favorable economic atmosphere for American service personnel and their dependents.

It should also be noted that the subject matter of this particular aspect of the Base Labor Agreement forms part of the deliberations concerning the Military Bases Agreement that are being renegotiated by the United States and the Philippines. Those negotiations were temporarily suspended last November by the Philippine government. There is currently no indication when the negotiations will resume. Since, however, the finalized treaty will require ratification by the Senate, it should resolve the question as to whether preferential employment of Filipinos is to continue.

Your interest in this matter is appreciated and it is hoped that the above information will be of assist-

ance. Ms. Conard's letter is returned as you requested.

Sincerely,

WM. N. PRICE
Director
Personnel Management Division

Enclosure

Copy to:
NAVSTA Subic Bay
Attachment Five
CA 78-2346

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